Supreme Court, U.S.
FILED

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08-493 OCT 10 2008

OFFICE OF THE CLERK

No._____

In the
SUPREME COURT OF THE UNITED STATES

MIGUEL AND INGA GUTIERREZ,

Petitioners,
v.

JOHN S. AND ELIZABETH A. GORDON,

Respondent.

On Petition for a Writ Of Certiorari to the New Mexico Supreme Court

---

PETITION FOR A WRIT OF CERTIORARI

Miguel and Inga Gutierrez
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Appearing Pro Se

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QUESTIONS PRESENTED FOR REVIEW

Petitioners asserted that the state courts have defied the United States Supreme Court in ignoring their opinions and even ignoring the opinions of their own State Supreme Court. The courts have also ignored the United States Constitution that they have sworn to uphold under their oath of office. In another action of foreclosure the state courts also openly ignored federal laws and regulations as well as many United States Supreme Court opinions and orders. Petitioners were denied the rights guaranteed to them in the United States Constitution and the New Mexico State Constitution to fair an impartial hearings, the right to present evidence and right to own property with the same rights as white people. The state continued the trials without jurisdiction and allowed open perjury violating the constitutional right to due process. Do the petitioners have a constitutional and vested right to enforcement of the code of federal regulations especially when it concerns the safety and health of the petitioners and the public when the regulations are ignored and to require that the states obey the United States Constitution and the laws and opinions of the Supreme Courts?

PARTIES TO THE PROCEEDINGS

Petitioners

Miguel and Inga Gutierrez were and are citizens of the United States when they had lawsuits filed against them for interference with easement and foreclosure. Miguel and Inga Gutierrez were the Defendants in the state court actions.

Respondent

John S. and Elizabeth A Gordon were and are citizens of the United States when they filed the lawsuit in state court for interference with easement. The Gordons were the Plaintiffs in the state court actions.

Countrywide Home Loans Inc. was also the Plaintiff in a foreclosure action in state court.

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I. THIS IS A CASE OF SUCH PUBLIC IMPORTANCE ESPECIALLY WITH ALL THE PREDATORY LENDING INVOLVED IN THE MORTGAGE INDUSTRY. THE CODE OF FEDERAL REGULATIONS AND STATE LAWS ARE IN PLACE TO PROTECT NOT ONLY THE CONSUMERS BUT ALSO THE TAXPAYERS. ENFORCING THESE LAWS AND REGULATIONS IS A DUTY OF THE GOVERNMENT, STATE AND FEDERAL, AS A VALID EXERCISE IN POLICE POWER TO ENSURE THE SAFETY AND HEALTH OF ALL THE PEOPLE.....10

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petitions for a Writ of Certiorari to review the New Mexico State Court decisions in these cases.

OPINIONS BELOW

The New Mexico Court of Appeals affirming the District Courts grant of summary judgment, the New Mexico Supreme Court denying Certiorari. The District Court opinion that the Defendants failed to state a claim of relief against the Plaintiffs. In the Gordon case the New Mexico Court of Appeals affirmed the judgment stating that the area was not a subdivision citing an unspecified exception, none of which apply, and did not comply with the state laws that requires an investigation in keeping with the United States Supreme Court Decisions. The New Mexico Supreme Court denied certiorari and rehearing.

JURISDICTION

The opinion of the New Mexico State Court of Appeals was issued as final on July 17, 2008 after the New Mexico Supreme Court denied Certiorari.

Petition is timely and the United States Supreme Court has jurisdiction as a court of last resort.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case concerns the New Mexico Home Loan Protection Act, Federal and State Lending Laws, New Mexico and Federal Constitutional rights to a jury trial, Mortgage Loan and Loan Broker Act, Unfair Practices Act, New Mexico State Subdivision Laws, HUD and VA Regulations. It also involves the constitutional rights to bodily integrity and a safe home and water. The constitutional right to own property, equal treatment and constitutional rights from takings of private property without compensation.

STATEMENT OF THE CASE

Petitioners Miguel and Inga Gutierrez purchased a home at 127 Lower Cottonwood Trail, La Luz, New Mexico 88337. Benchmark Mortgage, an affiliate an employee of Countrywide Home Loans, Inc., turned over servicing of the loan on April 16, 2004 to their employer, Countrywide Home Loans, Inc., with the closing on April 20, 2004. The petitioners attempted to stop the loan within the three-day rescission period (It is also a federal violation to fund the loan within the three day period which was also asserted in the pleadings constituting a violation of 12 CFR 226.33 and is considered a substantive violation.) but were threatened with immediate foreclosure if they continued to challenge them. In accordance with the Federal Laws the rescission period is increased from 3 days to 3 years and the Defendants noticed

Countrywide within that period. Under Title 15 U.S.C. § 1635 and 12 C.F.R § 226.23:Under 1635 (b) all the consumer needs to do is notify the creditor of his intent to rescind. The Defendants have done so in their pleadings[1]. In the Gordon case the Petitioners asserted that the development was in an illegal subdivision and state laws require the issue must be litigated and the United States Supreme court ruled that the extent of the development must be decided[3] before any court decision can be rendered but the state courts refused to comply with the laws and the Supreme Court opinions, including their own

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[1] *Ford Motor credit Co. vs Milhollin*, 444 U.S. 555,565, 63 L. Ed. 2d 22, 100 S CT. 790 (1980). The agreement is then automatically rescinded and the creditor must ordinarily tender first. In *Myers v Federal Home Loan Mortgage Co.* (In re Myers) 175 Bankr. 122, 1876, (Bankr. D. Mass. 1994) the Defendants state that all security interests is void upon the notice of rescission in the pleadings to the creditor (Countrywide) and this effect rescission cannot be conditioned or modified by the court. In *Aquino v. Public Fin. Consumer Discount Co.* 606, F. Supp. 504 (E.D.Pa 1985) " courts in their effort to insure a just result should not forget that TILA was passed primarily to aid the unsophisticated consumer" and that it was "intended to balance scales thought to be weighted in favor of lenders and to be liberally construed in favor of borrowers." id at 509 citing *Thomka v. A.Z.* Chevrolet, Inc. 619 F 2d, 246, 248 (3d Cir 1980) and *Biizer v. Globe Financial Services*, Inc. 654 F. 2d 1,3 (1st Cir 1981).

opinions. It was discovered the escrow agent was the daughter of the seller's real estate agent. When she was told to stop the closing and the disbursement of the funds she claimed that she didn't know how or who could do this and that the funds had already been disbursed even though they weren't disbursed until the next day.

HUD, in an attempt to curb these predatory lending practices, issued a new rule in July 2004:
WASHINGTON - As part of an ongoing effort to curb predatory lending and increase accountability in its mortgage insurance programs, The Department of Housing and Urban Development today published a final rule that makes lenders accountable for appraisals on mortgages insured by the Federal Housing Administration (FHA). The rule will be published in today's Federal Register and becomes effective August 19, 2004. "Holding lenders accountable when appraisers they select engage in fraudulent activities is another step this Administration is taking to protect homebuyers, particularly minorities, from unscrupulous predatory lending practices," said Assistant Secretary for Housing-Federal Housing Commissioner John C. Weicher. Predatory lending has no place in the FHA market or any other part of the real estate market.

Predatory lending results when home purchasers become unwitting victims of lenders, sellers and appraisers, often working together. The unsuspecting home buyers either purchase homes

with sales prices far in excess of the fair market value, or are substantially overcharged with costs associated with obtaining a mortgage. Petitioners had many concerns including work and repairs that were supposed to be done but were not, the basic structure of the home itself, land and water. There was evidence of a reverse osmosis system that had been removed even though the disclosure statement indicated there were no water problems but the petitioners discovered an assessment by the County Assessor's Office indicating that there were water problems. Almost everything of significance in the disclosure was blatantly untrue, including the denial of the existence of any easements.[2]

A survey was not done until almost two years later revealing a shortage of over 1.149 acres of land and a false statement from the surveyor with regard to the easements and access. The VA had been asked to investigate but remained silent as they do to this

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[2] This Court also has recognized the "constitutional significance" of water and "its scarcity and overall importance in our semiarid state ." *Bybee v. City of Albuquerque,* 120 N.M. 17, 20, 896 P.2d 1164, 1167 (1995).
Certainly, the availability of water is a vital issue, see *Thieme v. Worst,* 113 Idaho 455, 745 P.2d 1076, 1080 (Idaho Ct. App.) (rescission available when water not deliverable), cert. denied, 116 Idaho 467, 776 P.2d 829 (Idaho 1987), and in this case, the Slough Spring water included in the agreement and the Slough Spring water subsequently claimed by operation of law were potentially mutually exclusive. Where reasonable minds could differ, the trial court erred in granting summary judgment. See *C.R. Anthony Co.,* 112 N.M. at 510, 817 P.2d at 244; *Koenig v. Perez,* 104 N.M. 664, 667, 726 P.2d 341, 344 (1986).

day, even after the property has been proven to have no legal access, a shortage of land, non-potable water to the extent it is not fit for watering vegetation, unsafe roads, structural defects and is in an illegal subdivision where the oversights, again, have chosen to remain silent in the face of the overwhelming evidence. [3]

Petitioners have been continuing the investigation of this property, even in the face of false criminal charges being filed against them, arrests, civil lawsuits and harassment in an effort to stop the information from being released. To this day the authorities entrusted with the investigation remain silent. With all the events surrounding this sale, the petitioners were forced into foreclosure. In the

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[3] It is well established that state laws may be preempted by properly promulgated federal regulations as well as through duly enacted laws. "Federal regulations have no less pre-emptive effect than federal statutes." 458 U.S. at 153. 12 C.F.R. § 560.2(a) (2002) states that OTS "hereby occupies the entire field of lending regulations for federal savings associations." The regulation further provide that "the types of state laws preempted by [HOLA] include, without limitation, state laws purporting to impose requirements regarding . . . initial charges, late charges, prepayment penalties , servicing fees, and overlimit fees." 12 C.F.R. § 560.2(b)(5) (emphasis added). Specifically, OTS states in 12 C.F.R. § 560.34 (2002):
The National Housing Act preempts state laws for FHA and VA Insured loans.
These matters cannot be resolved in definitive terms until a court knows "the extent of permitted development" on the land in question. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351 (1986).

response to the foreclosure the petitioners stated that the contract was fraudulent and violated federal laws, ordinances, and regulations, including the minimum standards of the VA requirements. (Title 38 Part 36 §§ 4201 through §§ 4709). The VA states that the loan is guaranteed, not the property, but it is patently obvious that the legislative intention for the minimum standards is to protect the investment and the public as a whole. The state district court granted summary judgment to Countrywide citing that rule 12 (b) (6) negated Countrywide's responsibility for the loan requirements as the purchaser of the loan and stated the petitioners had no claim against Countrywide for relief. Petitioners had demanded a jury trial for the legal issues regarding the contract but the court denied the trial and granted the summary judgment even after acknowledging the fact of there being genuine issues. Foreclosure is an equitable claim where the legality of the contract is a legal claim and must be remanded to a jury when demanded. The New Mexico Court of Appeals affirmed, and then denied reconsideration and the New Mexico Supreme Court denied Certiorari, making the Court of Appeals order final. After the final order Petitioners filed an amended notice of appeal in a timely fashion.

In particular, the unsafe water violates the right to be safe and secure and the minimum standards are an exercise in police powers for the protection of the public as a whole. Per the 1996 appraisal record noting water problems, the county knew the water presented problems. With the water issue clearly a

dangerous situation and meant to be protected by Federal regulations in HUD and the VA minimum standards this was only one genuine issue presented to and acknowledged by the judge in open court. A permissive access to the property, which is not a legal and irrevocable access, is another genuine issue as is the fact that nine of eleven properties were sold in this subdivision in less than three years and, under the New Mexico subdivision Act, places this property directly in violation of the law as an illegal subdivision allowing further remedies such as rescission and making the property unlawful to sell.

58-21-19. Compliance with federal law.

In connection with any loan originated, brokered, negotiated or made by a registrant pursuant to the Mortgage Loan Company and Loan Broker Act [58-21-1NMSA 1978], registrants shall comply with:

A. applicable federal consumer lending laws; and
B. the provisions of the Home Loan Protection Act [58-21A1 NMSA 1978].

13-835. Illegality; enforceability of contractual obligations.
At the time this contract was entered into, there was in force in the State of New Mexico a certain [statute] [ordinance] [regulation] which provided:
(set out statutory language)
If you find that _____ violated this statute, then _____ was

> excused from performing [his] [her] obligations under the contract.

Petitioners were denied their right to a jury trial.[4] Violations include agreeing to an interest rate of 5.5% but surprising the petitioners at closing with a much higher rate of 6.25%, admitting the repairs could cost around $30,000 but refusing to provide a hard copy of the repairs needed, appraisals and documents showing that the property was in compliance with the law. The appraisal was grossly inflated, in part, to help with the costs of the needed repairs to make the house comply; repairs that were never done. The disclosure provided by the realtor was virtually totally false in every relevant aspect. The escrow agent demanded the veteran provide the use of his exemption for property taxes to write off the previous owners taxes due, something they admitted routinely doing. All these acts clearly prove this to be a predatory loan that violates not only federal regulations but also state laws, and makes the contract void ab initio.[5]

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[4] The United States Supreme Court has said that "state-law causes of action for breach of contract or warranty are paradigmatic private rights." 492 U.S. at 56.

[5] Horowitz's criterion of "public and general act" thus reflects the traditional "rule of law" assumption that generality in the terms by which the use of power is authorized will tend to guard against its misuse to burden or benefit the few unjustifiably. [n.42] See, *e.g.*, *Hurtado v. California*, 110 U.S. 516-526(1884) ("Law . . . must be not a special rule for a particular person or a particular case, but . . . `[t]he general law . . .' so `that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society' ")

REASONS FOR GRANTING THE PETITION

Granting the petition not only sends the message that predatory lending is wrong but that the oversights will be held accountable to the taxpayers to do their jobs and enforce these regulations that clearly are established to protect not only the taxpayers but the safety of the consumers and general public. The Petitioners have a right to their bodily integrity, and the water on this property is a serious health risk that can cause many medical, dental and other serious problems. It is not even fit for irrigation and is responsible for the death of two crias. In addition it is unlawful under state law to sell a property in an illegal subdivision, which would put the courts at odds with the laws they swore to uphold.

> 47-6-8. Requirements prior to sale, lease or other conveyance (1995).
> It is unlawful to sell, lease or otherwise convey land within a subdivision before the following conditions have been met:
> A.The final plat has been approved by the board of county commissioners and has been filed with the clerk of the county in which the subdivision is located. Where a subdivision lies within more than one county, the final plat shall be approved by the board of county

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We will not enforce a contractual provision that violates public policy. *Bruch* , 117 N.M. at 213, 870 P.2d at 751; accord *Phoenix Indem. Ins. Co. v. Pulis* , 2000-NMSC-023, P20,129 N.M. 395, 9 P. 3d 639.

commissioners of each county in which the subdivision is located and shall be filed with the county clerk of each county in which the subdivision is located;

B.The subdivider has furnished the board of county commissioners a sample copy of his sales
contracts, leases and any other documents that will be used to convey an interest in the subdivided land; and

C. All corners of all parcels and blocks within a subdivision have been permanently marked with metal stakes in the ground and a reference stake placed beside one corner of each parcel. [6]

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[6] We also note that the imposition of subdivision controls is a classic exercise of state police power to preserve the health, safety, and general welfare of the community. See *Select Western*, 94 N.M. at 558, 613 P.2d at 428. Not only do subdivision regulations help insure a safe and healthy place to live, but subdivision regulations also "protect tax revenues and prevent undue disbursements of public funds by limiting the creation of blighted areas." 13 Richard R. Powell & Patrick J. Rohan, Powell on Real Property ¶ 873[1][a], at 79D-8 (1997). When illegal subdivisions are created without financial accountability from the subdivider, it is often the taxpayers who are left to fund essential infrastructure. To its credit, our society simply will not tolerate for long the presence of blighted, unregulated areas like the colonias in question, and thus, sooner or later the essential improvements will be built. The legislative question is who will pay for them: the sellers who initiate the chain reaction of lot splits or the innocent taxpayer? The Subdivision Act is the legislative answer to that question. See Attorney General's Manual, supra, at 7. Simply put, those who profit from dividing and selling unimproved land must

By these regulations and laws the government assumes a duty to all the public for their safety. In this new era of predatory lending and the subprime crisis it is clear that the oversights of the government are not taking their jobs seriously and enforcing these regulations that are in place to protect not only the consumers and general public but the taxpayers investments. Federal regulations are to be enforced even through the state courts under the supremacy clause of the US and State Constitutions. This is a matter of such importance to the public as a whole due not only to the safety and health issues but the constitutional issues regarding safety and body integrity and forcing the oversights of the government to perform their constitutionally mandated duty and stop the predatory lending, fraud and preserve the safety and integrity of a system put in place just for this purpose. Countrywide, by participating in the VA loan program, had to file a certification that the property complied with all laws and regulations. Countrywide's attorney stated this was none of the

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bear some of the cost of making that land habitable. Certiorari denied No. 25,109, May 20, 1998, 1998-NMCA-072.
"[The Court's] cases," we are reminded, uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 351 (1986). See also *Agins v. Tiburon*, 447 U.S. 255, 260 (1980). Because petitioner "has not yet obtained a final decision regarding how [he] will be allowed to develop [his] property," *Williamson County Regional Planning Comm'n of Johnson City v. Hamilton Bank*, 473 U.S. 172, 190 (1985)

petitioner's business and the VA, who has regulations and minimum standards, stated they only guarantee the loan not the property. If this is so then why even have the legislature write the regulations if they are not to be enforced? The VA can refuse to guarantee a loan if it doesn't comply with the standards and the veterans and consumers have a vested right that the VA will enforce these regulations. Petitioners had a reasonable expectation that the regulations were in place for this purpose and not just there to occupy shelf space. Violations of the regulations contained in the minimum standards constitute a breach of contract and breach of trust between the lender and the expectations of the consumer that the federal regulations in place afford a level of protection from fraud.[7] In the Gordon case the subdivision laws

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[7] The Coastal Commission, if it had so chosen, could have denied Page 483 U.S. 825, 845 97-98, 86 S.Ct. 1800 (citations omitted).

Finally, again relying upon Peacock, the court noted that any denial of federal rights that might come to pass as the proceedings progressed could be redressed by direct review of the federal claims by the state appellate court and the United States Supreme Court or in other proceedings designed to remedy claims of unfair proceedings, denial of equal protection, and rights protected under 1983. Id. at 798, 86 S.Ct. 1800.We understand the doctrine to require a right of action that is "closely intertwined" with a regulatory program. *Granfinanciera* , 492 U.S. at 54. See also *Germain v. Conn. Nat'l Bank* , 988 F.2d 1323, 1331 (2d Cir. 1993) ("If a party is going to be deprived of as fundamental a constitutional right as a jury trial, the controversy must be inextricably intertwined with a public right; the 'involvement' may not be casual or vague."). The United States Supreme Court has said that

mandate the investigation into the development. In addition the federal regulations state that there must be a permanent irrevocable access. Additionally the Gordons and witnesses knowingly testified falsely that the front area of the Plaintiff's property had been used by the public for the prescription period of over ten years by bicyclists, etc., which was proven false to the federal court and done simply for the purpose of affecting the outcome of the pending federal lawsuit against them. Knowingly using perjury and false information and testimony makes the courts orders void. The result was a permanent injunction preventing the petitioners from "excluding others" using the petitioner's property and allowing the public to use the petitioner's property, a takings for public use, without just compensation. The petitioner's property is the only property in this area that was unlawfully made public, complete with setbacks, a zoning issue where there is no zoning. No others in this subdivision have these conditions forced onto them violating the right to equal treatment. The actual lay of the land further proves the outrageousness of the court's ruling.

"state-law causes of action for breach of contract or warranty are paradigmatic private rights." 492 U.S. at 56. If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result. *Padilla v. State Farm Mutual Automobile Insurance Co.*, 2003-NMSC-011, 133 N.M. 661,68 P .3d 901

CONCLUSION

The exercise of police power by the state is a power that must be applied even handedly even if it affects the largest lender in the country; the laws apply to all without exception. It is the power of the courts to ensure that the oversights entrusted by the public to enforce these laws and perform their duties regardless of who will be hurt, not simply to ignore the laws so that the weaker more vulnerable one is hurt instead of the giant. The laws and regulations are in place to protect the public and the consumers and must be evenly applied, to all equally in compliance with the United States Constitution. The county assessor clearly has identified a water problem or hazard. In appendix 1b, the letter from the title company attorney indicates 9 of 11 properties were sold. The state law for 1986 for subdivisions states that dividing any land for lease or sale into 5 or more triggers the subdivision laws, a fact that has been clearly and deliberately ignored by the courts and officials at all levels of the state government. The legislative intent of these regulations and laws was the safety and health of the public. There is a reasonable expectation from the consumer that these will be enforced and complied with. The state courts have blatantly violated the U.S. Supreme Courts decisions that decree that before any decision can be rendered there must be knowledge of the permissive development of the property. This is a clear violation

if the stare decisis principles that promote the stability and structure of the courts.

Respectfully submitted,

Miguel and Inga Gutierrez
P O Box 891
La Luz, New Mexico 88337
575-437-3277

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO
JULY 17, 2008

NO. 31,156

JOHN S. AND ELIZABETH A. GORDON,
Plaintiffs-respondents,
v.

MIGUEL AND INGA GUTIERREZ,
Defendants-Petitioners.

WHEREAS, this matter come on for consideration by the court, upon Motion for Rehearing, and the court having considered such said motion, and being sufficiently advised, Chief Justice Edward L. Chavez, Justice Patricio M. Serna, Justice Petra Jimenez Maes, Justice Richard C. Bosson, and Justice Charles W. Daniels concurring;

NOW, THEREFORE, IT IS ORDERED that the motion for rehearing hereby is DENIED.
IT IS SO ORDERED.

ATTEST: A TRUE Copy
s/Madeline Garcia
Clerk of the Supreme Court
of the State of New Mexico
SEAL

WITNESS, The Hon. .
Chavez , Chief Justice of
the Supreme Court of
the State of New
Mexico and the seal of said
court this 17th day of July 2008.
/s/ Madeline Garcia
Madeline Garcia, Chief Deputy Clerk

THE SUPREME COURT OF THE
STATE OF NEW MEXICO

No. 31,156

JOHN S. AND ELIZABETH A.
GORDON,
Plaintiffs-Respondents,
v.

MIGUEL AND INGA GUTIERREZ,
Defendants-Petitioners.

ORDER

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition, and being sufficiently advised, Chief Justice Edward L. Chavez, Justice Patricio M. Serna, Justice Petra Jimenez Maes, Justice Richard C. Bosson, and Justice Charles W. Daniels concurring;

NOW ,THEREFORE, IT IS ORDERED that the petition for writ of certiorari is denied in Court of Appeals number 28,230.

IT IS SO ORDERED.

SEAL
ATTEST: A
TRUE COPY

Witness the Hon. Edward L. Chavez, Chief Justice of the Supreme Court of the State of New Mexico, and the seal

/s/Madeline Garcia
Clerk of the
Supreme Court of
New Mexico

of said court on this 24th day of June 2008.

/s/ Madeline Garcia
Madeline Garcia, Chief Deputy Clerk

IN THE COURT OF APPEALS FOR
THE STATE OF NEW MEXICO

JOHN S. AND ELIZABETH A, GORDON,

Plaintiffs-Appelles,

v. No. 28230

MIGUEL AND INGA GUTIERREZ,

Defendants-Appellants.

stamp
Court of
Appeals
Albuquerque
filed May
21, 2008
/s/ Gina M. Maestas

A. JOSEPH ALARID
Presiding Judge
JONATHAN B. SUTIN
Chief Judge
CELIA FOY CASTILLO
Judge

ORDER ON MOTION FOR REHEARING
In this cause, a motion for rehearing being filed by the Defendants-Appellants, and consideration having been had by all the panel members of the original panel ,

IT IS SO ORDERED, that the motion for rehearing is hereby DENIED.

/s/ A. Joseph Alarid
A. Joseph Alarid, Judge

IN THE COURT OF APPEALS OF
THE STATE OF NEW MEXICO
Dated April 16, 2008

Stamp
Court of
Appeals
Albuquerque
/s/ Gina M. Maestas

JOHN S. AND ELIZABETH A. GORDON,

Plaintiffs-Appellees,

No. 28,230

MIGUEL AND INGA GUTIERREZ,

Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT OF
OTERO COUNTY, Frank K. Wilson, District Judge.

Burroughs and Rhodes
F. Randolph Burroughs
Alamogordo, New Mexico
For Appellees.

Miguel Gutierrez
Inga Gutierrez
Pro Se Appellants.

MEMORANDUM OPINION

Alarid, Judge,

In this dispute over road access, Miguel and Inga Gutierrez, appearing Pro Se (Defendants) appeal from the District Court's Judgment and Permanent Injunction. [RP532]. The judgment determined that the John S. and Elizabeth A. Gordon (Plaintiffs) had established a prescriptive easement to their property

and permanently enjoined Defendants obstructing or blocking the easement [id.] Defendants raise the following issues on appeal (1) whether the District court lacked jurisdiction to enter the judgment and permanent injunction regarding the disputed easement in this case because Defendants have appealed the foreclosure action to the United States Supreme Court by Notice of Appeal dated October 9, 2007, which is before the Notice of Appeal filed in this case [DS1-2]; (2) whether the District Court erred in concluding that the properties of the Plaintiffs and the Defendants are within an illegal subdivision [DS2] (3) whether the District Court's decision to continue the proceedings despite the illegal subdivision issue, constitutes an illegal takings and/or violation of the Defendant's Due Process rights [DS6] (4) whether the District Court erred in determining the location and width of the roadway [DS9] and (5) whether the District Court judge erred in refusing to grant a change of venue and in refusing to excuse himself from the proceedings, since according to the Defendants, this District judge and all the other judges as well as the justice system in Otero County are corrupt and biased against the Defendants, which violates their constitutional rights. [DS10]

This Court's calendar notice proposed Summary Affirmance. [Ct. App. File, CN1] Defendants have filed a Memorandum in Opposition. [Ct. App. File, MIO].
Unpersuaded We Affirm.

DISCUSSION

We review jurisdictional issues, the legal issues, and any alleged violations of constitutional rights under a De Novo standard of review. See Tri-state Generation & Transmission Ass'n. v. King , 2003-NMSC-029, ¶4, 134, N.M. 467, 78 P .3d 1226.

We review the District Court's findings and conclusions in the judgment and permanent injunction to determine whether they are supported by substantial evidence. See, e.g., Landavazo v. Sanchez, 111 N.M. 137, 138, 802, P .2d 1282,1284 (1990) ('Substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion.') 'In accordance with the standard of review when considering a claim of sufficiency of the evidence, the appellate court resolves all disputes in favor of the successful party and indulges all reasonable inferences in support of the Prevailing party.' Las Cruces Prof'l Fire Fighters v. City of Las Cruces, 1997-NMCA-044, ¶ 12, 123 N.M. 329, 940 P .2d 177. '[W]hen there is a conflict of testimony, we defer to the trier of fact." Buckingham v. Ryan, 1998-NMCA-012, ¶ 10,124 N.M. 498, 953, P .2d 33.

As we stated in the calendar notice, Defendants did not appear at the trial held in this case on November 14, 2007. The transcript and the judgment indicate that the district court noted that the Defendants did not appear despite having received notice of the hearing and despite Defendants having indicated in pleadings filed since the notice of trial date that they were aware of the trial date. [RP 519, 532-33] In the

docketing statement, moreover, Defendants do not contend that they did not receive notice of the hearing and acknowledge the date that it occurred. [DS1] Defendants contend, however, that the trial was of no legal effect, because the district court had no jurisdiction to hold the trial. [DS 1-2] Defendants contend the district court lacked jurisdiction, because the Defendant's property is presently before the United States Supreme Court on appeal from a foreclosure action [DS1-2]. We disagree.

First, the property is not under the jurisdiction of the United States Supreme Court. Apparently issues relating to the rights of the foreclosing party to foreclose on a loan to the Defendants is before the Supreme Court, but only to the extent that the Defendants have chosen to file a petition for writ of certiorari there. It is well established, however, , that whether an easement exists across land held in fee simple is an issue of state law. See Jicarilla Apache Tribe v. Board of Cty. Comm'rs, 118 N.M. 550, 557, 883 P .2d 136, 143 (1994). The fact that the Supreme Court may be considering whether to review a foreclosure action involving the Defendant's property does not divest the Otero County district court of jurisdiction to determine whether, in this case, Plaintiffs have acquired a prescriptive easement over the roadway in Otero County in dispute. Thus we hold that the district court did not err in determining that it had jurisdiction to hold the trial and to issue the judgment and permanent injunction regarding the easement in this case.

Second, we hold that Defendants' due process rights have not been violated. "Procedural due process requirements are not static, and the extent of the hearing required is determined on a case by case basis." See, e.g., Mills v. New Mexico State Bd. of Psychologist Exam'rs, 1997-NMSC-28, ¶ 19, 123 N.M. 421, 941 P .2d 502. "Due process is a flexible concept whose essence is the right to be heard in a meaningful time and in a meaningful manner." New Mexico Indus. Energy Consumers v. New Mexico Pub. Serv. Comm'n, 104 N.M. 565, 568, 725 P .2d 244, 247 (1986).

Defendants appeared in this action when they filed their answer to Plaintiffs' complaint for interference of easement on February 23, 2005. [RP 27] Defendants also appeared at hearings regarding their continued obstruction of the easement in violation of the preliminary injunction. [RP 60] The district court judge noted that Defendants had been served with notice of the trial date on June 28, 2007, and that Defendants had acknowledged notice in subsequent pleadings. [RP 519, 571] As such, Defendants do not contend, and the record would not support any such contention, that they did not receive notice of the trial to be held on November 14, 2007. Therefore despite the notice, Defendants chose not to appear at trial under the apparently mistaken belief that the district court lacked jurisdiction, as discussed above, and because they mistakenly insisted the district court erred in not recusing himself or changing venue for the trial due to bias against the Defendants. [Defendants contentions of regarding corruption and bias are addressed below].

Under the circumstances, with regard to due process, Defendants were given several hearings in this area, which they attended, and they were given notice of a trial date and an opportunity to present their version of events at the trial, which they chose not to take. We cannot say that Defendant's due process rights were violated in this case.

Third, Defendants have asserted below on appeal that the parties' properties comprise an illegal subdivision and that the district court must resolve this issue before resolving the easement dispute, because failure to do so violates Defendant's constitutional due process rights and their rights against takings of property without compensation. [DS2] The district court has ruled, however, that New Mexico subdivision laws have nothing to do with this lawsuit relating to a dispute over an easement. [RP 571] We agree.

The "New Mexico Subdivision Act" is set forth in NMSA 1978, Sections 47-5-9, 47-6-1 to 47-6-25, 47-6-26, 47-6-27, 47-6-28-29 (1995). Defendants have presented no evidence that would bring this case within the definition of a subdivision under NMSA 1978, Section 47-6-2 (L) (2005), rather than within the numerous exceptions listed therein. See, e.g., State ex rel. Anaya v. Select W. Lands, Inc., 94 N.M. 555, 613 P .2d 425 (St App 1979) (stating that the mere division of land is not a subdivision). In addition, the New Mexico Subdivision Act is an enactment in derogation of the common law constituting restrictions upon the free use of property and must be strictly construed against the state in its attempt to enforce the statute. State v.

Heck, 112 N.M. 513, 514, 817 P .2d 247, 248 (Ct. App. 1991). Finally, the New Mexico State Subdivision Act was not designed to protect landowners adjoining land being subdivided. See Gabaldon v. Sanchez, 92 N.M. 224, 226, 585 P .2d 11051107 (Ct. App. 1978). We also note, moreover, that counsel for the title company insuring Defendant's property issued an opinion letter to defendants that also concludes that the property is not within an illegal subdivision, since, for example, '[the title company] has not received any documentation to show that the Attorney General or some other governmental body has declared the insured property to be within an illegal subdivision. " [RP 582-83]

We hold that the New Mexico subdivision laws are not applicable to this case.

Since we hold that the New Mexico subdivision laws are not applicable in this case, we further hold that there has been no violation of Defendants' due process or other constitutional rights against takings without just compensation when the district court proceeded to hold the trial on the easement dispute notwithstanding Defendants' continuing and apparently mistaken assertions that the subdivision laws apply to make the property at issue and the surrounding areas within an illegal subdivision.

Fourth, Defendants argue that district court erred in establishing the location and width of the easement. We are not persuaded. The detailed trial log located in the record proper [RP 519-31], indicates that at trial, Plaintiff's presented substantial evidence to support the districts court's

finding a prescriptive easement in favor of the Plaintiffs. [id.] In addition, substantial evidence presented at trial supports the district court's decision to grant a permanent injunction against Defendants' interfering with the easement for the purposes of access and maintenance. [id] The location and width of the easement appear to have been established by documentation including surveys and deeds, and the testimony of several witnesses. [RP 521-31] We therefore affirm the judgment and permanent injunction; the findings are supported by substantial evidence and the findings support the conclusions of law. [RP 532-538]

Finally, Defendants assert bias and corruption because the district court judge, 9a) did not rule in their favor with regard to the Plaintiff's right to a prescriptive easement, (b) refused to recuse himself or allow a change of venue (c) refused to consider Defendants' illegal subdivision contentions, and (d) proceeded to hold the trial and issue a judgment and injunction. We have held that the district court acted in accordance with New Mexico law and that it's judgment and permanent injunction are supported by substantial evidence. As such, defendants have mistakenly inferred personal bias from the district court's adverse rulings. See State v. case, 100 N.M. 714, 717, ,676 P. .2d 241, 244 (1984) (stating that personal bias cannot be inferred from adverse rulings). Moreover, judges are absolutely immune from suit in connection with their official duties; and in this case, the district court properly exercised its official duties by correctly applying and acting in compliance with New Mexico law. See Collins on

Behalf of Collins v. Tabet, 111 N.M. 391, 396, 806 P .2d 40, 45 (1991). (stating a judge should not have to fear that an unsatisfied litigant may hound him with litigation charging malice or corruption); see also, e.g., State v. Hernandez, 115 N.M. 6, 20, 846 P .2d 312, 326 (1993) (stating that adverse rulings or enforcement of the rules does not establish judicial bias); and see, e.g., Pizza Hut, Inc. v. Branch, 89 N.M. 325, 327-28,552 P .2d 227, 229-30 (stating "that trial courts have supervisory control over their dockets and inherent power to manage their own affairs so as to achieve the orderly and expeditious disposition of cases").

Defendants memorandum in opposition continues to cite the same facts and legal arguments they set forth in the docketing statement to which we prepared the calendar notice and proposed summary affirmance disposition. However, "[o]ur courts have repeatedly held that, in summary calendar cases, the burden is on the party opposing the proposed disposition to clearly point out errors in fact or law." Hennessy v. Duryea, 1998-NMCA-036, ¶ 24, 124 N.M. 754, 955 P .2d 683.

Conclusion

We affirm the districts court's judgment and permanent injunction because it was entered, (a) in accordance with the district court's jurisdiction and its official duties, (b) without violation of the Defendant's constitutional rights, and (c) upon substantial evidence presented at trial.

IT IS SO ORDERED.

/s/ A. Joseph Alarid
A. Joseph Alarid, Judge

WE CONCUR.

/s/ Jonathan B. Sutin
Jonathan B. Sutin, Chief Judge

/s/ Celia Foy Castillo
Celia Foy Castillo, Judge

TWELFTH JUDICIAL DISTRICT COURT
DIVISION IV
COUNTY OF OTERO
STATE OF NEW MEXICO

Cause No: 1215-CV-2005-00071

John S. Gordon and Elizabeth Gordon, his wife
Plaintiffs,

vs.

MIGUEL GUTIERREZ and INGA GUTIERREZ, his wife,
Defendants.

CORRECTED NOTICE OF APPEAL

Notice is hereby given that Miguel and Inga Gutierrez, pro se, Defendants in the above named cause hereby appeals to the United States Supreme Court from the Court of

Appeals order dated April 16, 2008, and Motion for Rehearing filed April 28, 2008 and denied by the Court of Appeals on May 21, 2008. Certiorari Denied by New Mexico Supreme Court dated June 24,2008 and New Mexico Supreme Court denial for Rehearing dated July 17, 2008.

STATEMENT OF JOINDER

The Defendants hereby Notice the Courts that the following cause has hereby been joined with the

above in an effort to preserve judicial integrity and resources and in the interest of justice which, without, will cause the Defendants irreparable harm. Both causes contain the same issues that in the public interest must be addressed. The cause being as follows:

TWELFTH JUDICIAL DISTRICT COURT
DIVISION II COUNTY OF OTERO STATE
OF NEW MEXICO Cause No: 1215-CV-2005-00467

COUNTRYWIDE HOME LOANS, INC. Plaintiffs
vs.

MIGUEL GUTIERREZ and INGA GUTIERREZ, his wife. Defendants.

Dated August 4,2008.

Miguel and Inga Gutierrez, Pro Se
PO Box 891
La Luz, New Mexico 88337
575-437-3277

THE SUPREME COURT OF THE
STATE OF NEW MEXICO
August 8, 2007

NO. 30,580

COUNTRYWIDE HOME LOANS INC.,

Plaintiff-Respondent,

v.

MIGUEL and INGA GUTIERREZ,

Defendants-Petitioners.

ORDER

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and response, and being sufficiently advised, Chief Justice Edward L. Chávez, Justice Patricio M. Serna, Justice Petra Jimenez Maes, and Justice Richard C. Bosson concurring, Justice Pamela B. Minzner not participating;

NOW, THEREFORE, IT IS ORDERED that the petition for writ of certiorari is denied in Court of Appeal number 27255.

IT IS SO ORDERED.

WITNESS, The Hon. Edward L. Chávez,

Chief Justice of the Supreme Court
of the State of New Mexico, and
the seal of said Court this 8th day of
August, 2007.

/s/ Madeline Garcia
(SEAL) Madeline Garcia, Chief Deputy Clerk

ATTEST: A TRUE COPY
/s/ Madeline Garcia
Clerk of the Supreme Court
of the State of New Mexico

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

No. 27,255

COUNTRYWIDE HOME LOANS. INC.,

Plaintiff-Appellee,

vs.

MIGUEL AND INGA GUTIERREZ

Defendants-Appellants.

MANDATE TO DISTRICT COURT CLERK

1. Attached is a true and correct copy of the original decision entered in the above titled cause.
2. This decision being now final, the cause is remanded to you for any further proceedings consistent with said decision.

By direction of and in the name of the Chief Judge of the Court of Appeals, this 2nd day of October 2007.

/s/ Gina M. Maestas

Gina M. Maestas, Chief Clerk of the Court of Appeals of the State of New Mexico
cc: Counsel w/out attachments

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

COUNTRYWIDE HOME LOANS, INC.,

Plaintiff-Appellee,

v.

MIGUEL AND INGA GUTIERREZ

Defendants-Appellants,

APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY
James Waylon Counts, District Judge

Vogel, Campbell & Blueher, P.C.
Clinton W. Marrs
Albuquerque, NM

for Appellee

MIGUEL GUTIERREZ
INGA GUTIERREZ
LA LUZ, NM

Pro Se Appellants

MEMORANDUM OPINION

VIGIL,Judge

Defendants, Miguel and Inga Gutierrez, appeal the district courts grant of summary judgment in favor of the Plaintiff in a foreclosure action. We issued a calendar notice, proposing to summarily affirm. Defendants have timely filed a memorandum in opposition. Remaining unpersuaded by the arguments in Defendant's memorandum in opposition, we affirm Plaintiff's Summary Judgment Motion.

Defendants argue that that the district court erred in granting summary judgment to Plaintiff. "Summary judgment is proper if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." Roth v Thompson, 113 N.M. 331,334,825, P.2d 1241,1224 (1992); accord Rule 1-056 (C) NMRA. In order to rule on a motion for summary judgment under Rule 1-056, courts must resolve all reasonable inferences in favor of the non-movant and must view the pleadings, affidavits, depositions, answers to interrogatories, and admissions in light most favorable to a trial on the merits. See Carillo v Rostro, 1114 N.M. 607, 615, 845 P .2d 130, 138 (1992). " If there is the slightest doubt as to the existence of material factual issues, summary judgment should be denied." Las Cruces Country Club Inc., v. City of Las Cruces, 81 N.M. 387, 387, 467 P .2d,403, 403 (1970). We review the district court's grant of summary judgment de novo. See Ulibarri v. State of NM Corrs. Acad., 2006-NMSC-009, ¶ 7,139 N.M. 193,131, P .3d 43.

We agree with the district court that the Plaintiff was entitled to judgment as a matter of law. The

burden is on the moving party to make a prima facie showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. See Cuip v. Chevron U.S.A Inc., 1996-NMSC-062, ¶ 7, 122 N.M. 537, 928, P .2d 263. To satisfy this burden Plaintiff submitted an affidavit stating the Defendants defaulted on a note with a mortgage of which the Plaintiff was the holder. [RP 179-181] Plaintiffs also submitted a copy of the note and mortgage with its complaint for foreclosure. [RP 7-26] Additionally, Defendants do not appear to contest that they defaulted on the mortgage. See Rule 1-056 NMRA (stating on a motion for summary judgment all material facts set forth in a statement of the moving party shall be deemed admitted unless specifically controverted). This was sufficient to make a prima facie case that the Plaintiff was entitled to summary judgment.

Once the movant makes a prima facie case it is entitled to summary judgment, "the burden shifts to the party opposing the motion to demonstrate the existence of specific evidentiary fact which would require a trial on the merits." See Johnson v. Sunwest Bank, 116 N.M. 422, 425, 863, P.2d 1043, 1046 (1993) (stating that the non-moving party may not rely on his pleadings to establish that triable issues of fact exist). Defendants failed to make such a showing.

In their various pleadings and in their memorandum in opposition, Defendants assert that summary judgment should not be granted because (1) there was no valid contract due to fraud, omissions, and misrepresentations; (2) the contract

violated public policy; (3) the home was not in compliance with applicable state and federal laws; and (4) the property was located in an illegal subdivision. [RP 50,59, 104-122; DS 2-7;MIO 1-2]

In our calendar notice, we noted that Defendants had not supported any of these allegations with affidavits, depositions, or other competent evidence. See Rule 1-056 (stating that when a motion for summary judgment is made and supported as provided by this rule, then the party opposing summary judgment may not rest on mere allegations or denials of his pleadings); see also Juneau v. Intel Corp., 2006-NMSC-002, ¶ 15, 139, N.M. 12, 127 P.3d 548 (stating that on summary judgment the non-movant may not rest on the pleadings, but must demonstrate genuine issues of material fact by way of sworn affidavits, depositions, or other such evidence). In their memorandum in opposition, defendants do not indicate any evidence in the record that would support these allegations. See Archuleta v. Goldman, 107, N.M. 547, 550, 761 P.2d 425, 428 (Ct. App. 1987) (stating that statements made in unsworn briefs are not evidence for the purposes of establishing a disputed issue of material fact in a summary judgment proceeding).

We note that the defendants attached a document to their memorandum in opposition which they contend supports their assertion that the property is in located in an illegal subdivision and in violation of federal laws. [MIO 5] However, "[i]t is improper to attach to a brief documents which are not part of the record on appeal." Jenko, Inc v Liaghat, 106 N.M. 50,54,738 P .2d 922,926 (Ct App. 1987). We therefore

do not consider it. See In re Aaron L, 2000-NMCA-024,¶ 27,128 N.M. 641,996, P.2d 431 (This court will not consider and counsel should not refer to matters not on record in their briefs.").

For these reasons, we hold that Defendants failed to show the existence of a genuine issue of material fact and affirm the district courts grant of Plaintiff's motion for summary judgment.

Defendants' Claims

Defendants argue that the district court erred in denying the Defendants' Truth in Lending Act claims, and in denying them the opportunity to obtain discovery that would support their defenses to the foreclosure action. [MIO 6] The district court found that defendant's assertion of Plaintiff's liability for problems with the property failed to state a claim against Plaintiff. [RP 222] In reviewing a dismissal for failure to state a claim, we "accept as true all facts well pleaded and question only whether the Plaintiffs might prevail under any state of facts provable under the claim." See Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A. 106 N.M. 757,760, 750 P.2d 118, 121 (1988).

Defendants state they asserted their claims against Plaintiff in their responses to the Plaintiff's pleadings. [DS 7;MIO 6] Based on our review of the Defendants' pleadings, it appears that Defendants made allegations that the property: (1) was in an illegal subdivision; (2) did not meet minimum standards of state and federal law; and (3) was in violation of water quality laws. [RP 106-116] Defendants also allege that the seller, the seller's agent, the escrow agent, the title company, and the

appraiser committed numerous acts of fraud in connection with the sale of the property. [RP 116-120] Additionally, Defendants allege that their neighbors physically assaulted and slandered them. [RP 118]

We agree with the district court that Defendants failed to state a claim against Plaintiff. Defendants' pleadings allege that numerous other people engage in fraudulent acts and misrepresentations and assert that Plaintiff had a duty to Defendants to verify the representations made by third parties regarding the condition of the property. [RP 118] Defendants also state that the original lender, Benchmark Mortgage, acted as the Plaintiff's agent, and Plaintiff was therefore liable for further fraudulent acts committed by Benchmark Mortgage. [RP 104]

Defendants have not cited any legal authority for their contention that Plaintiff was liable for misrepresentations made by third parties in connection with the sale of the property. See In re Adoption of Doe, 100 N.M. 764, 765, 676 P.2d 1329,1330 (1984) (stating that an appellate court will not consider an issue if no authority is cited in support of the issue). Additionally, Defendant's pleadings do not allege any facts that would show Benchmark Mortgage engaged in fraud or that Benchmark properties acted as Plaintiff's agent. See Rule 1-009 (B) NMRA (stating that in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity). We therefore hold that Defendants failed to allege facts that constituted claims against Plaintiffs, and

district court properly dismissed the claims. See Rule 1-008 (A) (2) NMRA (stating that a claim for relief must contain a short and plain statement of the claim showing that the pleader is entitled to relief); see also Fitzjerrell v. City of Gallup, 2003-NMCA-125,¶17,134 N.M. 492, 79 P.3d 836 (stating that a complaint is properly dismissed for failure to state a claim when it appears that the plaintiff cannot recover or be entitled to relief under any state of facts provable under the claim); Saylor v. Valles, 2003-NMCA-037,¶¶ 21-22, 133 N.M. 432,63 P.3d 1152 (upholding the district court's dismissal of the plaintiff's claims where the complaint failed to conform to rules governing pleadings).

Defendants also argue that the Plaintiff did not provide them with discovery materials that would have supported their defenses to the foreclosure action. [MIO 4} We do not believe that Defendants were prejudiced by Plaintiff's alleged failure to provide discovery in this case. Our review of Defendants' demand for discovery indicates the defendants requested that Plaintiff provide them with the subdivision approval plans, the appraisal for the property and overall plat of the subdivision. [RP 64-68] The documents requested by defendants relate to its assertion that the property was not in compliance with state and federal law. Defendants have cited no authority in support of its claim that this would constitute a defense to the foreclosure action. We therefore hold that defendant was not prejudiced. See State v. Deutsch, 103 N.M. 752,756 P.2d, 1008, 1012 (Ct App. 1985) (noting a party is

not entitled to relief for a discovery violation unless the party has been prejudiced by the violation).

Finally, in their docketing statement, Defendants argued that the district court improperly denied them the homestead exemption. [DS 7] In our calendar notice, we proposed to hold that Defendant was not entitled to the statutory homestead exemption because the homestead exemption does not apply to foreclosure by a mortgage lien holder, such as the Plaintiff in this case. See NMSA 1978, § 42-10-11 (1971) (stating that the homestead exemption of Section 42-10-9 does not apply to recorded liens of mortgagees);NMSA 1978, §42-10-9 (1993) (allowing an owner or purchaser of a dwelling exemption of $30,000 from attachment, execution, or foreclosure by a judgment creditor, proceedings of receivers or trustees in insolvency proceedings, and executors and administrators in probate).

Defendants have not responded to our proposed summary disposition of this issue in their memorandum in opposition. See State v. Johnson, 107 N.M. 356, 358, 758 P.2d 306,308 (Ct. App. 1988) (stating that when a case is decided on the summary calendar, an issue is deemed abandoned where a party fails to respond to the proposed disposition of this issue). We therefore hold the trial court properly denied Defendants the statutory homestead exemption.

For these reasons and the reasons stated in our notice of proposed summary disposition, the judgment of the district court is AFFIRMED.

IT IS SO ORDERED

/s/ Michael E. Vigil

Michael E. Vigil, Judge

WE CONCUR

/s/ Jonathan B. Sutin

Jonathan B. Sutin, Chief Judge

/s/ Michael D. Bustamante

Michael D. Bustamante, Judge

TWELFTH JUDICIAL DISTRICT COURT
DIVISION II
COUNTY OF OTERO
STATE OF NEW MEXICO

Cause No: 1215-CV-2005-00467

COUNTRYWIDE HOME LOANS, INC.
Plaintiffs,

vs.

MIGUEL GUTIERREZ and INGA GUTIERREZ, his wife,
Defendants.

AMENDED NOTICE OF APPEAL

Notice is hereby given that Miguel and Inga Gutierrez, pro se, Defendants in the above named cause hereby appeals to the United States Supreme Court, the order granting Summary Judgment dated November 6, 2006, the Memorandum and Opinion dated June 14, 2007, Order Denying Motion for a Rehearing dated July 5, 2007, the Order Denying the Petition for Writ of Certiorari dated August 8, 2007, and the order making the decision final dated October 2, 2007.
Dated October 9, 2007.

/s/Miguel Gutierrez Inga Gutierrez
Miguel and Inga Gutierrez Pro Se
PO Box 891
La Luz, New Mexico 88337,575-437-3277

APPENDIX B

MOSES; DUNN, FARMER *8* TUTHILL; P.C.

Mr. Miguel Gutierrez
PO Box 891
La Luz, NM 88337

Re: Claim No.: 185365
Policy No: 72106-639240 ("Policy")

Dear Mr. Gutierrez:

Chicago Title Insurance Company ("CTIC") has asked this Firm to respond to your letter to CTIC dated September 23, 2007. In the letter you advise that you intend to file suit in federal court, presumably against CTIC, and allege various common law and statutory claims. You state in the letter that there is no legal access to the property insured under the Policy, that the insured property is part of an illegal subdivision, and that over 1.149 acres is missing from the property.

In preparing this response, I reviewed the enclosures to your September 23,2007 letter.
I also reviewed the claim denial letter dated May 6, 2005 that Jessica Bailess sent you. I will discuss each of the title claims mentioned in your letter.
Lack of a Right of Access

When you first submitted your claim in 2005, CTIC investigated whether legal access existed to the insured property. CTIC determined that the insured property is one of 11 lots located in an area that is surrounded by Bureau of Land Management ("BLM") land. access to the 11 lots begins at County Road A-059 and continues through the Amistad Subdivision and the BLM land on a road known as Lower Cottonwood Trail. CTIC did not locate a license agreement with BLM to cross its land, but we did find a letter dated September 7, 1990 that was attached to a road maintenance agreement recorded in the real property records of Otero County that granted permission for owners to use the road crossing the BLM land to reach the 11 lots. We further understood that no one contested your right to use the road for access to the insured property. Therefore, the claim based on a lack of a right of access was denied.

Based on my review, it does not appear that the circumstances have changed. I conclude that the prior coverage determination was correct. If you believe I have not considered all facts or have misunderstood certain facts, please explain your position in filing and CTIC will consider whether the additional information provided affects this coverage determination.

Illegal Subdivision

You contend that your lot is in an illegal subdivision. CTIC has not received any documentation to show that the Attorney general or some other governmental body has declared the insured property to be within an illegal subdivision. Even if such documentation exists, it would appear

that a title claim on this basis is excluded under the paragraph 1 (a) of the Policy found under the section entitled "Exclusions From Coverage." That provision excludes coverage for claims based on laws, ordinances or regulations that restrict or regulate the occupancy, use and enjoyment of the insured land. Thus, I concur with the Ms.Bailess' determination that this claim is excluded from coverage.

If a governmental body has determined that your property lies within an illegal subdivision, or you believe I have not considered all facts or have misunderstood certain facts, please explain your position in writing and *CTIC* will consider whether the additional information provided affects this coverage determination.

Missing Acreage

You advise that over 1.149 acres is missing from your property. It is not clear to CTIC where you believe the shortage exists. Even assuming a shortage in area exists, when the Policy was issued, Schedule B took exception to coverage related to "Encroachments, overlaps, conflicts in boundary lines, shortages in area, or other matters which would be disclosed by an accurate survey and inspection of the premises." (Emphasis added).
Apparently, there was no request by you to the title agent to delete this exception. Thus, I agree with the prior determination that there is no coverage for this matter.

If you believe I have not considered all the facts or have misunderstood certain facts, please explain your position in writing and CTIC will consider whether the additional information provided affects this coverage determination.

CTIC reserves the right to deny coverage based on other grounds.

Very truly yours,

MOSES, DUNN, FARMER & TUTHILL, P.C.

By /s/ Joseph L. Wertz
Joseph L. Wertz

JLW/rr
cc: Johnell Barkley